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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

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In re Application of Dale Burns and Theodore Palles

Serial No.: 09/491,919

Group Art Unit: 2135

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Filed: 01/27/2000

Examiner: Dada, Beemnet W.

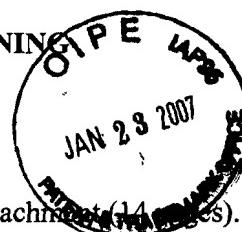
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Appeal No.: 2006-3035

For: SYSTEM AND METHOD FOR EMAIL SCREENING

Received in the Patent and Trademark Office:

1. Transmittal Letter (2 copies);
2. Request for Rehearing Under 37 CFR 41.52, with attachment (14 pages).



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**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE BOARD OF PATENT APPEALS AND INTERFERENCES**

In re Application of Atty. Docket No.: 2391-002
Dale BURNS Conf. No. : 9242
Appln. No.: 09/491,919 Group Art Unit: 2135
Filing Date: Jan. 27, 2000 Examiner: Dada, Beemnet W.
Appeal No.: 2006-3035

For: **SYSTEM AND METHOD FOR EMAIL SCREENING**

REQUEST FOR REHEARING UNDER 37 C.F.R. 41.52

Mail Stop Appeal Brief - Patents
Commissioner for Patents
P.O. Box 1450
Alexandria, VA 22313-1450

Dear Sir:

Enclosed, please find:

1. Appellants' Request for Rehearing in response to the Decision on Appeal dated November 30, 2006.

The Commissioner for Patents is hereby authorized to charge all necessary fees or credit any overpayments to the Deposit Account No. 18-1579. A duplicate copy of this letter is enclosed.

Respectfully submitted,


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Express Mailing Label No.: EV 955981497 US

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE BOARD OF PATENT APPEALS AND INTERFERENCES**

In re Application of Atty. Docket No.: 2391-002
Dale BURNS Conf. No. : 9242
Appln. No.: 09/491,919 Group Art Unit: 2135
Filing Date: Jan. 27, 2000 Examiner: Dada, Beemnet W.
Appeal No.: 2006-3035

For: **SYSTEM AND METHOD FOR EMAIL SCREENING**

* * * * *

APPELLANTS' REQUEST FOR REHEARING UNDER 37 C.F.R. 41.52

* * * * *

Mail Stop Appeal Brief - Patents
Commissioner for Patents
P.O. Box 1450
Alexandria, VA 22313-1450

Dear Sir:

In accordance with the provisions of 37 C.F.R. § 41.52, Appellants respectfully request rehearing and submit the following:

- The Board of Appeals failed to consider the prior art as a whole in dismissing Appellants' impermissible hindsight arguments.
- Appellants Brief on Appeal cited the portions of the specification that define the claim term "recipient computer" as the computer at which an email recipient receives email.
- A "recipient computer" is different from, and narrower than, "any computer receiving data."
- Appellants' arguments regarding the "recipient computer" were not addressed by the Examiner's Answer.
- The finding by the Board of Appeals that the ordinary meaning of the claim term "recipient computer" is "any computer that receives data" is clearly erroneous.

- The finding by the Board of Appeals that the broadest reasonable interpretation of the claim term “recipient computer” is “any computer that receives data” is clearly erroneous.
- The finding by the Board of Appeals that the broadest reasonable interpretation of the claim term “recipient computer” is “any computer that receives data” constitutes a new ground of rejection under 37 C.F.R. 41.50.
- Board of Appeals failed to consider the use of the words “recipient computer” in the context of the written description and as used in the relevant art of email communication.

Arguments Based Upon the Briefs

The Board of Appeals Failed to Consider the Prior Art as a Whole

As argued by Appellants on Page 4 of the Brief on Appeal, in the present invention, the ordinary path of e-mail delivery is initially followed for the email to reach a recipient, but then “the path is extended by having *all the e-mail sent back out to a screening server before any ultimate delivery back to the recipient.*”

On Page 5 of the Brief on Appeal, Appellants submitted that “Council already teaches centralized email screening by email address at an ISP (see Col. 2:33-47).” As a whole, Council teaches a form of *email interception*. Appellants also submitted on Page 5 of the Brief on Appeal that “Hypponen et al. teaches interception of suspect emails and centralized screening” and at page 6 of the Brief on Appeal that “Hypponen et al. still ascribes to the prior art method of virus scanning by *interception* at a firewall/gateway *prior to ever being delivered to a recipient computer* (see paragraphs [0011] to [0014] and the first box of figure 2). Although Hypponen et al. suggests the re-routing of certain types of data to a screening server (see paragraph [0035]), it still relies on a few ‘protected systems’ to intercept and re-route the mail.” Appellants submitted at page 8 of the Brief on Appeal that “The prior art is primarily drawn to interception and scanning/cleaning of email at intermediate points in the delivery process. Hypponen et al. continues to teach this sort of system based upon interception by ‘protected systems’ prior to suspect data being delivered to a user on the network with the protected systems.”

Appellants further argued at the top of Page 6 of the Brief on Appeal that a combination of Council and Hypponen would more likely result in the redirection of Hypponen occurring *at*

the ISP since both systems are intercept systems: “The more likely result of a combination of Council with Hypponen et al. would be an email screening system in which multiple ISP (transit nodes) looked to a central server for an updated authorization list.”

Because the prior art, *as a whole*, teaches the *interception of email at a transit node*, there is no suggestion within the prior art or the nature of the problem to be solved or within the general knowledge of a person of ordinary skill in the art to apply the “redirect” teachings of Hypponen to the *recipient node* of Council.

Appellants do not dispute that it might be obvious to apply the redirect and scanning teachings of Hypponen to Council for the reasons submitted, only that there is no reason to apply those teachings *at the recipient node* of Council in order to reconstruct Appellants invention, absent impermissible hindsight.

Indeed, as stated on Page 3 of the Reply Brief, “the presently-claimed invention requires *forwarding or re-routing* of email received at the recipient computer from the *recipient computer* to a *screening server*... In contrast to this, the applied prior art ascribes to the interception method of email screening as done by ISPs or firewalls (i.e., transit nodes).”

And finally, the Board of Appeals appears to have disregarded Appellants’ argument on Page 4 that Hypponen’ disclosure of interception and redirection to a virus server at transit nodes “teaches away from having the *recipient computer* do the rerouting, as presently claimed.”

Of course, all of Appellants arguments with regard to the *recipient computer* of the claimed invention performing the rerouting of received email depend on a proper interpretation of the term “recipient computer,” which is further addressed below.

Appellants Brief Cited to Portions of the Specification Defining “Recipient Computer”

On page 2 of Appellants’ Brief on Appeal, Appellants cited the following portion of the specification (page 7, lines 12-17) to describe the claimed sender computer and recipient computer:

“Email sender 10 is also connected to network 14 and sends email in the typical fashion to recipient computer 16. Both the recipient computer 16 and the email sender 10 may be, a personal computer, such as an IBM PC, with an applications platform such as Windows™ or MacIntosh™, without limitation. The recipient computer 16 and email sender 10 include a processor, for example a Celeron 360 or a Pentium III, and memory for processing and storage.” ..

Appellants note that email senders do not purposely send email to any transit nodes, but rather only specify the recipient address so that the email may be read on a computer of the recipient (i.e., “recipient computer”).

Page 2 of Appellants’ Brief on Appeal also cited the following portion of the specification (page 5, lines 5-10) to describe the claimed recipient computer further comprising software instructions for forwarding all email messages received to the email screening server:

“The present invention is an email screening system. The invention involves all email that is directed to a particular email address being rerouted to an alternate location. This is accomplished by the email recipient registering his or her address with an alternative location, which will be a server, of the present invention. Software that resides on the recipient’s machine automatically reroutes the email to this alternative server.”

As such, in the summary of the claimed subject matter discussed in the Brief on Appeal, Appellants cited to portions of the written description that clearly discussed an email recipient registering his or her email address with an alternative location, software of the present invention residing on the recipient’s machine (i.e., computer), and email from a sender to a recipient computer being sent in the typical fashion. In view of this, Appellants respectfully submit that the ordinary meaning to one of ordinary skill in the art of email communication of the term “recipient computer” is the computer at which an email recipient receives email and that such a meaning is the only reasonable interpretation consistent with the specification.

Recipient Computer is Different from Any Computer Receiving Data

Appellants respectfully submit that the terms “recipient” and “receiving” do not have the same scope or meaning. As such, there are significant differences between the claimed term, “recipient computer,” and the term, “any computer that receives data,” which was found to be a reasonable interpretation by the Board of Appeals. In the art of email communication, a recipient is *a specific person to which the email sender intended the communication to reach*. While it may be inherent that all *recipient* computers in an email communication *receive* email data, not all computers that *receive* email data in an email communication are intended *recipient* computers - hence one of the distinctions between *transit* nodes and *user* nodes. These distinctions are clearly recognized in the cited prior art: Hypponen clearly differentiates transit nodes 4a-4d from users 2; and Council clearly differentiates between end user data terminal

equipment (DTE's) and data communication equipment of ISP's 2 and 5. Appellants' Brief on Appeal and Reply Brief cited these differences with respect to Hyponnen, as outlined below.

Appellants Arguments Not Addressed by Examiner

On page 6, Paragraph 3 of Appellants' Brief on Appeal (and nearly identically at Page 8, Paragraph 4 of Appellants' Brief on Appeal), Appellants argued as follows:

“Hyponnen et al. still ascribes to the prior art method of virus scanning by *interception* at a firewall/gateway *prior to ever being delivered to a recipient computer* (see paragraphs [0011] to [0014] and the first box of figure 2). Although Hyponnen et al. suggests the re-routing of certain types of data to a screening server (see paragraph [0035]), it still relies on a few ‘protected systems’ to intercept and re-route the mail, and thus the system will only work when a user is attached to the network with the ‘protected systems.’ In the present invention, the recipient computer can be connected to any network, not just a protected one.”

In the paragraph spanning pages 6 and 7 of Appellants' Brief on Appeal, Appellants further argued that:

“Hyponnen et al. discloses a method of detecting viruses in a computer network comprising *intercepting* data at at least one data *transit node* of the network. The transit nodes that employ the invention are called ‘protected systems’ which are described in paragraph [0032] as ‘firewall 4a, mail server 4b, a proxy server 4c and a database server 4d.’ These protected systems are not *recipient computers* (called ‘users or clients 2’ in paragraph [0031]), but rather *transit computers*, and they identify which of the network data is of a type capable of containing a virus and transfers the identified data to a virus scanning server 7 over the network. In use, an email recipient is only protected when accessing email over the network that has the protected systems.”

In the first full paragraph of page 7 of Appellants' Brief on Appeal, Appellants argued as follows:

“None of these prior art systems include *recipient computer software* to re-route or forward received email to a scanning server. The prior art is primarily drawn to interception and scanning/cleaning of email at intermediate points in the delivery process. Hyponnen et al. continues to teach this sort of system based upon interception by “protected systems” prior to suspect data being delivered to a user on the network with the protected systems.”

In response to Appellants' Brief on Appeal, in Paragraphs 2 and 7 of the Examiner's Answer, as well as the 2nd paragraphs in each of Grounds I and Grounds II of the Response to App. No. 09/491, 919 Request for Rehearing

Argument of the Examiner's Answer, the Examiner repeatedly submitted (using the language from the final rejection) that:

“Hypponen [et al.] teaches a recipient system (mail server and user work stations, see figure 1, unit 4b & 2a-d) comprising software instruction for forwarding email messages to email screening server (virus scanning server see figure 1, unit 7) [see page 2, 0035-0036 & 0040-0041].”

Similarly, in the first full paragraph of Page 8 of the Examiner's Answer, the Examiner argued that:

“Hypponen et al. teaches a recipient computer (i.e., mail server and user work stations, see figure 1, unit 4b & 2a-d) including redirecting received email messages to a screening server (i.e., virus scanning server, see figure 1, unit 7) [see page 2, 0035-0036 & 0040-0041].”

The Examiner's Answer alleged that it addressed Appellants' arguments by stating that “the features upon which the applicant relies...are not recited in the rejected claims.” However, the Examiner's Answer failed to address Appellants' argument that the “protected systems [of Hypponen] are not *recipient computers* (called ‘users or clients 2’ in paragraph [0031]), but rather *transit computers*...” Such a “recipient computer” with a forwarding function is recited in all of the claims.

Instead, as submitted above, the Examiner's Answer merely listed multiple, mutually-exclusive components (mail server and user work stations) without ascribing the forwarding function to any particular component (yet citing portions of Hypponen that attributed the function to the transit nodes, such as the mail server, but *not* to the “users or clients 2” that are the equivalents of “recipient computers” in Hypponen). Indeed, Appellants respectfully submit that the Examiner's Answer failed to include any explicit arguments concerning the “broadest reasonable interpretation” of the claimed “recipient computer” such that it is unclear *how* the Board of Appeals could “find that a broad but reasonable interpretation of the claimed ‘recipient computer’ reads on the Hypponen reference *in the manner argued by the examiner*” (emphasis added). Because the Examiner's Answer failed to address Appellants' arguments, Appellants could only state in the Reply Brief that the Examiner's Answer “appears to allege that the mail server of Hypponen et al. can be a ‘recipient computer’ required by the claims.”

As such, Appellants respectfully submit that the finding by the Board of Appeals that “the recited term ‘recipient computer’” encompasses “any computer that receives data” constitutes a new grounds of rejection under 37 C.F.R. 41.50(b), and submits the following arguments under 37 C.F.R. 41.52(a)(3).

New Arguments under 37 C.F.R. 41.45(a)(3)

In the Decision on Appeal, the Board of Appeals construed “the recited term ‘recipient computer’ in accordance with its plain, ordinary, and accustomed meaning as broadly encompassing any computer that receives data.” To apparently support this finding, the Board first noted portions of Hypponen that were cited by Appellants to illustrate that the cited prior art related to *transport nodes* instead of the claimed “recipient computer”: i.e., that “Hypponen’s computer nodes consist of ‘protected systems’ such as: firewall 4a, mail server 4b, proxy server 4c and database server 4d [¶ 0032]. ” The Board also noted that “Hypponen shows computers 4a, 4b, 4c, and 4d each connected to network 3 [fig. 1]” (emphasis in original). Again, instead of supporting the Examiner’s alleged position, the cited portions more appropriately serve to illustrate the recognized *difference* in the prior art between transit nodes and user nodes (such as sender and recipient computers).

The Board further found “the examiner’s interpretation of the claimed ‘recipient computer’ to be entirely consistent with the breath of support found in the specification at page 7, lines 4 and 5; i.e., “Recipient computer 16 is connected to a network, preferably the Internet, although this is not meant as a limitation” [emphasis added].” Appellants respectfully submit that the emphasis added by the Board illustrates a failure to understand that the term “although this is not meant as a limitation” refers to “preferably the Internet” and not the connection to a network. Indeed, the phrase is followed by: “For example, any other wide area network or intranet having **email recipients** and senders would be suitable for the present invention” (emphasis added). All of the claims explicitly require the recipient computer be connected to a network and email cannot function without a network.

Appellants respectfully submit that the case law and M.P.E.P. § 2111.01 define the correct standard for determination of the plain meaning of a claim term during prosecution of an application. During examination, the claims must be interpreted as broadly as their terms reasonably allow. *In re American Academy of Science Tech Center*, 367 F.3d 1359, 1369, 70 App. No. 09/491, 919 Request for Rehearing 7

USPQ2d 1827, 1834 (Fed. Cir. 2004) (The USPTO uses a different standard for construing claims than that used by district courts; during examination the USPTO must give claims their broadest reasonable interpretation in light of the specification.). This means that the words of the claim must be given their plain meaning unless the plain meaning is inconsistent with the specification. *In re Zletz*, 893 F.2d 319, 321, 13 USPQ2d 1320, 1322 (Fed. Cir. 1989).

"[T]he ordinary and customary meaning of a claim term is the meaning that the term would have to a person of ordinary skill in the art in question at the time of the invention, *i.e.*, as of the effective filing date of the patent application." *Phillips v. AWH Corp.*, 415 F.3d 1303, 1313, 75 USPQ2d 1321, 1326 (Fed. Cir. 2005) (*en banc*). *Sunrace Roots Enter. Co. v. SRAM Corp.*, 336 F.3d 1298, 1302, 67 USPQ2d 1438, 1441 (Fed. Cir. 2003); *Brookhill-Wilk 1, LLC v. Intuitive Surgical, Inc.*, 334 F.3d 1294, 1298 67 USPQ2d 1132, 1136 (Fed. Cir. 2003) ("In the absence of an express intent to impart a novel meaning to the claim terms, the words are presumed to take on the ordinary and customary meanings attributed to them by those of ordinary skill in the art."). It is the use of the words **in the context of the written description** and customarily by those skilled in the **relevant art** that accurately reflects both the "ordinary" and the "customary" meaning of the terms in the claims. *Ferguson Beauregard/Logic Controls v. Mega Systems*, 350 F.3d 1327, 1338, 69 USPQ2d 1001, 1009 (Fed. Cir. 2003) (Dictionary definitions were used to determine the ordinary and customary meaning of the words "normal" and "predetermine" to those skilled in the art. In construing claim terms, the general meanings gleaned from reference sources, such as dictionaries, must always be compared against **the use of the terms in context**, and the intrinsic record must always be consulted to identify which of the different possible dictionary meanings is **most consistent with the use of the words by the inventor.**) (emphasis added); *ACTV, Inc. v. The Walt Disney Company*, 346 F.3d 1082, 1092, 68 USPQ2d 1516, 1524 (Fed. Cir. 2003).

The Board of Appeals Failed to Consider the Context and Relevant Art

In the present case, the Board of Appeals **failed to consider the use of the words in the context of the written description and as used in the relevant art of email communication.** Specifically, Appellants respectfully submit that the plain, ordinary meaning of the term "recipient" in the context of the written description (as cited above) and in the communications context (such as email) refers to *an individual*, as found in *The Free On-line Dictionary of App. No. 09/491,919 Request for Rehearing*

Computing: “One who receives; receiver. E.g. ‘No recipient of the e-mail message will know about the other addressees who were listed in the BCC header’” (see the attached citation to recipient.Dictionary.com. *The Free On-line Dictionary of Computing*. Denis Howe. <http://dictionary.reference.com/browse/recipient> (accessed: January 22, 2007)).

As such, the plain meaning of a “recipient computer” in the email context is the computer at which an email recipient receives and reads an email. This meaning is entirely consistent with the specification, which states:

- “The invention involves all email that is directed to a particular email address being rerouted to an alternate location. This is accomplished by the email recipient registering his or her address with an alternative location, which will be a server, of the present invention. Software that resides on the recipient’s machine automatically reroutes the email to this alternative server” (page 5, lines 5-10)
- “A System user has screening software installed on his computer. The screening software forwards all email received to an alternate server. Each e-mail message is screened for viruses. If the e-mail message has a system password associated with it, no charge is applied for the screening. The message with the system password is then directly forwarded to the recipient. If the e-mail message does not have a system password, the E-mail Screening System requires the sender to pay a fee for the screening. Once no system password is found, the sender and recipient are each notified of the attempted delivery and required fee. If the sender pays the fee, the E-mail Screening System then delivers the message. Alternatively, the recipient can accumulate charges for messages from outside the system and pay the fee” (page 6, lines 9-18);
- “Email sender 10 is also connected to network 14 and sends email in the typical fashion to recipient computer 16. Both the recipient computer 16 and the email sender 10 may be, a personal computer, such as an IBM PC, with an applications platform such as Windows™ or MacIntosh™, without limitation. The recipient computer 16 and email sender 10 include a processor, for example a Celeron 360 or a Pentium III, and memory for processing and storage. In the present invention, recipient computer 16 has software to recognize when email is being received regardless of the source and redirecting that email over network 14 to screening server 12. Screening server 12 screens the email for

any viruses and any passwords and performs additional functions for both recipient computer 16 and sending computer 10 as more fully described in Figure 2” (page 7, lines 12-22); and

- “the recipient computer can simply be an IBM pc or compatible or any other workstation now readily available to the public” (page 10, lines 5-7).

Also note that one of ordinary skill in the art of email communication further recognizes that email recipients do **not** use transit nodes (i.e., firewalls, mail servers, proxy servers, and database servers) to read their email.

Further, Appellants note that the claim language itself aids in interpretation of the term “recipient computer.” Each of the independent claims further includes limitations to the screening server conditionally forwarding the scanned email to the recipient computer. In claim 1, this limitation is “email screening server further comprises software instructions for screening the email for viruses and notifying the sender computer that the email will be forwarded to the recipient computer for a fee.” This limitation would make little sense if the recipient computer were a transit node since, even upon paying a fee, if the recipient computer were merely a transit node, the sender would not be assured that the paid-for email would reach its destination, which is the inherent purpose of the fee.

In claim 6, this limitation is “forwarding screened email to a recipient computer if the email possesses a recipient password.” Again, this limitation would make little sense if the recipient computer were a transit node since, even upon using a password, if the recipient computer were merely a transit node, the sender would not be assured that the email including the password would reach its destination, which is the purpose of the password.

In claim 10, this limitation is multipart, consisting of “the screening server notifying the sender computer of the email that the scanned email will be sent to the recipient computer for a fee; the screening server sending the scanned email to the recipient computer over the network if the fee is paid; and sharing the fee with a recipient associated with the recipient computer.” This limitation would make little sense if the recipient computer were a transit node since, even upon paying a fee, if the recipient computer were merely a transit node, the sender would not be assured that the paid-for email would reach its destination, which is the inherent purpose of the fee. Likewise, the sharing of the fee would make little sense. However, this claim *explicitly* recites sharing the fee with “a recipient associated with the recipient computer” so as to *explicitly*

confirm Appellants' interpretation of the term "recipient computer." A similar explicit limitation is found in dependent claim 9 for independent claim 6.

And finally, the Board's interpretation of "recipient computer" as "any computer that receives data" is clearly erroneous since it effectively makes a nullity of the term "recipient." In the claims, the "recipient computer" is always claimed as connected to a network. The primary purpose of a computer network is data transmission, such that receiving data is inherent. In view of this, it is abundantly clear that the term "recipient" in "recipient computer" modifies "computer" in order to identify *which computer it is in an email communication between a sender and a recipient.*

Conclusion

For the above reasons, Appellants respectfully requests reconsideration, and asks that the Examiner's rejections and the finding by the Board of Appeals that the broadest reasonable interpretation of "recipient computer" as "any computer that receives data" be reversed.

Respectfully submitted,

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re·cip·i·ent [ri-sip-euh nt] [Pronunciation Key](#) - [Show IPA Pronunciation](#)
-noun

 1. a person or thing that receives; receiver: *the recipient of a prize*.

-adjective

2. receiving or capable of receiving.

[Origin: 1550-60; < L *recipient-* (s. of *recipiēns*), prp. of *recipere* to RECEIVE; see ENT.]

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re·cip·i·ent (rī-sip'ē-ənt) [Pronunciation Key](#)

adj. Functioning as a receiver; receptive.

n.

1. One that receives or is receptive.
2. One who receives blood, tissue, or an organ from a donor.

[Latin *recipiēns*, recipient-, present participle of *recipere*, *to receive*; see *receive*.]

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noun

1. a person who gets something
2. the semantic role of the animate entity that is passively involved in the happening

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re·cip·i·ent (rī-sip'ē-ənt)

adj.

Functioning as a receiver; receptive.

n.

One who receives blood, tissue, or an organ from a donor.

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Main Entry: re·cip·i·ent

Pronunciation: ri-'sip-E-ənt

Function: noun

: an individual who receives biological material (as blood or an organ) from a donor

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recipient communications

One who receives; receiver. E.g. "No recipient of the e-mail message will know about the other addressees who were listed in the BCC header."

(2000-03-22)

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recipient [rē'spiənt] noun

a person who receives something

Example: *the recipient of a letter*

Arabic: مُتَلِّمٌ، مُتَلِّفٌ

Chinese (Simplified): 受领人，接受者

Chinese (Traditional): 受領人，接受者

Czech: příjemce

Danish: modtager

Dutch: ontvanger

Estonian: vastuvõtja, saaja

Finnish: vastaanottaja

French: récipiendaire;
destinataire

German: der, *die
Empfänger(in)

Greek: παραλήπτης,
αποδέκτης

Hungarian: átvevő, címzett

Korean: 수취인, 수령인

Latvian: saņēmējs

Lithuanian: gavėjas

Norwegian: mottaker

Polish: odbiorca

Portuguese (Brazil): destinatário

Portuguese (Portugal): destinatário

Romanian: destinatar

Russian: получатель

Slovak: príjemca

Slovenian: prejemnik

Spanish: destinatario

Swedish: mottagare

Turkish: alıcı

Icelandic: viðtakandi

Italian: ricevente,
destinatario

Japanese: 受取人

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